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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, Special Aministrator and Personal Representative of the Estate of Curtis B. Campbell,

Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

BRIEF OF *AMICUS CURIAE* FREEDOMWORKS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the Utah Supreme Court's decision on remand contravened this Court's mandate in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and fundamental due process principles, by imposing a punitive damages award vastly in excess of the amount this Court deemed constitutionally permissible, by rejecting specific holdings and findings of this Court in its application of the constitutional punitive damages guideposts, and by relying on the defendants' perceived lack of remorse in its defense and appeal of this case as a basis for punitive damages?

The following three distinct issues (among others) are encompassed within this question:

1. Did the Utah Supreme Court err in failing to compare the punitive damages award to the civil sanction that could have been applied in the most relevant provision of Utah law because the court viewed this exercise, which is required by this Court's decisions, as "quixotic"?

2. Did the Utah Supreme Court err in equating transgressions that occur in the economic realm with physical assaults for purposes of the reprehensibility analysis, even though this Court's decisions draw a clear distinction between the two?

3. Did the Utah Supreme Court err in punishing State Farm for successfully appealing the $145 million punitive award to this Court on the ground that its decision to appeal, and its presentations on appeal, demonstrated a lack of remorse?

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INTEREST OF *AMICUS CURIAE*

FreedomWorks is a nonprofit, nonpartisan organization with approximately 360,000 members. One of its missions is to educate citizens on, and to promote the adoption of, free-market policies that inure to the benefit of consumers and citizens generally. Accordingly, FreedomWorks and one of its affiliated organizations, Citizens for a Sound Economy ("CSE"), have taken an active part in the public debate on antitrust enforcement, regulation of the Internet, deregulation of the telecommunications industry and a host of other issues that affect the Nation's economy.

FreedomWorks has an interest in this case because it is vitally interested in assuring that tort liability, including punitive damage liability, is calibrated to promote sound economic principles. When this case was last before the Court, an affiliate of CSE, the CSE Foundation, filed an *amicus curiae* brief. FreedomWorks and CSE continue to have a strong interest in the outcome of this litigation, and believe that the path chosen by the Utah Supreme Court is both inconsistent with the legal principles embodied in this Court's due process cases as applied to punitive damages awards and rational economic theory.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court brought much-

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[1] The parties have filed blanket written consents with the Clerk to the filing of *amicus* briefs in this case. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

Amicus Curiae adopts the facts and procedural history set forth in the petition for writ of certiorari.

needed clarity to the limits imposed by the Due Process Clause on court-imposed punitive damage awards. In a way that this Court's prior cases had not, *State Farm* gave notice to potential defendants of the scope of potential punitive damage awards, thereby facilitating greater certainty in economic planning. It is thus imperative that the Court vigilantly guard its pronouncements in *State Farm* against erosion by lower courts—state and federal. The constitutional rulings of this Court deserve substantially more respect than *State Farm* received in the Utah Supreme Court. If this Court does not respond, it will send a regrettable signal that lower courts may disregard *State Farm* with impunity.

For example, in its decision, this Court noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. This Court went on to reason that the facts of this case would not justify nearly so high an award:

> An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.

Id. at 429.

On remand, the Utah Supreme Court wholly ignored this Court's conclusion that a punitive award approximating the compensatory award was appropriate, calling it a mere "prediction." Pet. App. 5a. Having dismissed this Court's ruling out of hand, the Utah Court then proceeded to award plaintiffs punitive damages equal to nine times the compensatory award. That award approached the limit of this Court's single-digit ratio guideline, even though this Court's earlier opinion made clear that State Farm's conduct did *not*

approach the upper end of the "reprehensibility scale" outlined in that opinion.

As aptly demonstrated by the Petition for Certiorari, this Court should grant review in this case to ensure compliance with its prior ruling and to provide additional guidance to the lower courts on these important issues. *Amicus* wishes to highlight three more specific reasons why this Court's review is needed:

First, this Court should grant certiorari to enforce its earlier directive that lower courts consider similar penalties in their assessment of punitive damages. Here, the Utah Supreme Court ignored this Court's directive that it compare the punitive award to the magnitude of "'civil penalties authorized or imposed in comparable cases,'" 538 U.S. at 428 (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996)), and that the "most relevant civil sanction under Utah state law . . . appears to be a $10,000 fine for an act of fraud." *Id.* at 428. The Utah Supreme Court decided that this comparison would not affect its analysis of the proper damage award in this case, referring to the comparison as "quixotic." Pet. App. 17a.

The Utah Supreme Court's decision to disregard this Court's instruction to compare the punitive award to other legislatively authorized penalties is particularly troubling, and worthy of review, because it creates a very real risk of overdeterrence. Inherent in this Court's rulings is an understanding that courts should give significant deference to the legislature's considered judgment of what level of punishment should be applied in a given case. Failing to give such deference creates a very real risk of overdeterrence, which can force manufacturers to stop producing useful products or can force insurance companies to stop offering certain forms of insurance. This Court should grant certiorari to ensure that courts give some weight to the carefully considered judgments of legislatures on the necessary level of

deterrence in considering the size of a punitive damage award.

Second, certiorari is likewise appropriate because the Utah Supreme Court, in its reprehensibility analysis, improperly equated economic conduct with "physical assault." This Court's decisions, including its prior decision in this case, make plain that transgressions that occur in the economic realm simply are not as reprehensible as physical assaults or other physical invasions. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 514 U.S. 559, 575-76 (1996); *State Farm*, 538 U.S. at 426. To justify the excessive punitive damage award in this case, however, the Utah Supreme Court ignored these precedents and concluded that State Farm's actions were especially reprehensible because they were "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a.

If left undisturbed, the Utah Supreme Court's ruling would make punitive damages wholly unpredictable. It would thereby undermine the deterrent value of punitive damages because potential defendants will be unable to determine what actions are likely to lead to an exorbitant punitive award. This Court should grant certiorari so that it can make clear that economic transgressions are categorically not as reprehensible as physical assaults.

Third, certiorari is also appropriate because the Utah Supreme Court improperly concluded that State Farm could be punished for vigorously contesting the $145 million punitive award that this Court found excessive. This Court has held on numerous occasions that individuals (and companies) may not be punished for exercising their constitutionally protected rights. See, *e.g.*, *Griffin* v. *California*, 380 U.S. 609 (1965); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). On remand from this Court, however, the Utah Supreme Court proceeded to punish State Farm for daring to challenge that court's ruling that a $145 million punitive award was justified. This Court should grant

certiorari to establish that a litigant cannot be punished, via an enhanced punitive damage award, for advocacy that is vigorous yet undertaken in good faith.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT THE ANALYSIS OF "SIMILAR PENALTIES" REQUIRED BY THIS COURT'S DECISIONS CANNOT BE DISREGARDED OR CIRCUMVENTED SIMPLY BECAUSE A REVIEWING COURT DISAGREES WITH THIS COURT'S JUDGMENT ABOUT THE NEED FOR THAT ANALYSIS.

One important reason to grant plenary review, or even summary reversal, in this case is to enforce the Court's earlier directive that lower courts consider similar penalties in their assessment of punitive damages. In *State Farm*, this Court specifically reiterated that a court reviewing a punitive damages award should be guided by the magnitude of "'civil penalties authorized or imposed in comparable cases.'" 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). In particular, "'legislative judgments concerning appropriate sanctions for the conduct at issue'" should be accorded "'substantial deference'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). And here, this Court explained that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud," which is "dwarfed by the $145 million punitive damages award." *State Farm*, 538 U.S. at 428.

Despite that clear ruling, on remand, the court below concluded that this guidepost would have no impact on its analysis of the appropriate punitive award. Indeed, the court below was openly hostile to such comparisons, asserting that

"the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based upon penalties affixed by a legislature can be quixotic." Pet. App. 17a. The court thus concluded, without further elaboration, "that $9,018,780.75 is amply supported by the $10,000 civil penalty." *Id.* at 18a. That conclusion warrants this Court's review, for reasons of both law and sound economic policy.

A. The Utah Supreme Court's Decision Conflicts With This Court's Requirements.

First of all, the decision below clearly conflicts with this Court's decisions. In *Gore*, this Court explained that "[e]lementary notions of fairness" require "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. There, the Court observed that the "maximum civil penalty authorized by the Alabama Legislature" for conduct comparable to the non-disclosure at issue in that lawsuit was $2,000. *Id.* at 584. Given this maximum statutory penalty, the *Gore* Court concluded that a defendant would not have "fair notice" that a failure to disclose information "might subject an offender to a multimillion dollar penalty." *Id.* Moreover, the Court explained that the statutory penalties for comparable conduct were relevant to determine whether the sanction imposed "was necessary to deter future misconduct" in that the maximum statutory fine reflected the State legislature's assessment that "less drastic remedies could be expected to achieve that goal." *Id.*; see also *State Farm*, 538 U.S. at 428 (explaining that punitive award "dwarfed" the "civil sanction under Utah state law").

In its decision below, the Utah Supreme Court rendered this guidepost and its underlying principles a nullity by approving a punitive award more than 900 times larger than the maximum civil penalty authorized by the Utah Legislature for the "most relevant civil sanction." *State Farm*, 538 U.S. at 428. The court reached that result by suggesting that this

Court's decision implicitly "endorsed a punitive damages award of $1 million which is one hundred times greater than the $10,000 fine." Pet. App. 17a. The court then reasoned that a punitive award 900 times greater than the fine must, therefore, still be "in line with the third *Gore* guidepost." *Id.* The court thus reduced the inquiry to an absurdity.

In doing so, the Utah Supreme Court ignored the principle that statutory penalties are critical to an evaluation of the excessiveness of a punitive damages award because they (1) provide "notice" of the "severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574, and (2) reflect the legislature's judgment regarding the magnitude of the sanction "necessary to deter future misconduct," *id.* at 584. Nowhere did the court below consider whether State Farm was somehow on notice that its conduct in this case could subject it to a penalty more than 900 times greater than the maximum sanction authorized by the Utah Legislature. Similarly, the court did not consider the Utah Legislature's judgment about the appropriate sanction necessary to "deter future misconduct" of the sort at issue in this case, and whether State Farm could be deterred through a puntive damages award more in keeping with the Utah Legislature's judgment. *Id.*

B. As A Matter Of Sound Economic Policy, It Is Important To Look Closely At Similar Penalties Because They Embody A Legislative Judgment About The Proper Amount Of Punishment Needed To Provide Adequate Deterrence Against The Type Of Conduct At Issue.

Not only does the decision below flout this Court's established precedent, it ignores the importance of legislative judgments about the appropriate level of sanction necessary to provide adequate deterrence.

Ideally, a tort system should perform two functions: compensate victims and deter and punish bad acts. With

regard to deterrence and punishment, it is critically important, from an economic perspective, to avoid excessive punitive awards. Often, a significant compensatory award both makes the plaintiff whole, and creates powerful economic incentives for a defendant to avoid future improper conduct. See *State Farm*, 538 U.S. at 425. To be sure, "a multimillion dollar penalty" may "prompt[] a change in policy" but that "sheds no light on the question whether a lesser deterrent would have adequately protected the interests of [a State's] consumers." *Gore*, 538 U.S. at 584.

Indeed, excessive punitive awards impose significant economic costs reflected in higher product prices or the disappearance of desirable products from the market.[2] The costs associated with excessive awards impose unnecessary economic hardship on the defendant when a smaller award would be sufficient to deter the same future, improper conduct. These costs, in turn, may impose unnecessary hardship on consumers forced to pay higher prices or to forgo useful products.

In striking the appropriate balance, this Court has properly counseled that special deference be paid to legislative judgments about the magnitude of a sanction necessary to punish and deter similar conduct. *Id.* Given the judgment of the Utah legislature here, the decision of the court below to insist upon a punishment more than 900 times greater than the maximum penalty authorized by the legislature for comparable conduct imposes an excessive punitive award on

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[2] *E.g., Insurance Companies, Fearing Jury Verdicts, Shy Away From State*, Associated Press State & Regional Wire, June 19, 2001, *available at* LEXIS NEWS/APST (noting that 40 insurers doing business in Mississippi have stopped selling certain kinds of insurance or pulled out of the state entirely as a response to excessive jury verdicts); *Battle Brews in Arkansas Over Nursing-Home Liability*, Bert's Ins. News, Oct. 10, 2001, *available at* 2001 WL 24725205 (explaining that only two of 80 insurers that have authority to write liability policies for nursing homes in Arkansas are doing so).

State Farm. At the same time it harms the economic interests of consumers who will, directly or indirectly, be required to bear this unwarranted burden in the form of higher prices, reduced consumer choice, or both.

II. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT ECONOMIC AND EMOTIONAL HARM CANNOT BE EQUATED WITH "PHYSICAL ASSAULT" IN THE "REPREHENSIBILITY" ANALYSIS.

Another reason to grant review is the lower court's departure from this Court's teaching about the difference between economic conduct and physical violence. In *State Farm*, this Court made clear that one factor to be considered in the reprehensibility analysis is whether "the harm caused was physical as opposed to economic." *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 576-77). On remand, the Utah Supreme Court ignored the clear mandate of this Court's ruling—that transgressions committed in the economic realm are inherently not as reprehensible as are physical harms. Instead the court below concluded that "misconduct which occurs in the insurance sector of the economic realm is likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a.

This Court should grant certiorari to review the Utah Supreme Court's equation of damages that result from an economic transgression and those that result from a physical assault. This ruling is contrary to this Court's precedents and threatens to interfere with sound economic policy by making the award of punitive damages less predictable.

A. The Utah Supreme Court's Decision Conflicts With This Court's Analysis Of The Reprehensibility Issue.

This Court's prior decision made clear that economic transgressions are not as reprehensible as are physical assaults. Indeed, in noting that reprehensibility did not weigh

heavily in favor of a high punitive award in this case, this Court explained that "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." *State Farm*, 538 U.S. at 426. This Court made plain that State Farm's actions, while tortious, were not as reprehensible as a physical assault.

As noted earlier, the Utah Supreme Court ignored this clear mandate by concluding that State Farm's conduct was just as reprehensible as a physical assault because its actions were "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a. To reach this conclusion, the court below was forced to shift the focus of the inquiry away from the nature of the conduct that it criticized toward the harm caused. In doing so, the court below attached an implausible meaning to this Court's words: "The Supreme Court's observation is carefully phrased. It does not classify the injury inflicted on the Campbells by State Farm as 'economic.' Rather, it notes that the transaction which gave rise to the injury was in the 'economic realm.'" *Id.* at 9a.

But that word-play should not be allowed to stand. This Court's precedents, including its prior opinion in this case, make clear that the relevant question in the reprehensibility analysis is the blameworthiness of the defendant—an inquiry that focuses on the nature of the *defendant's* conduct. As this Court explained in *Gore*, "[the reprehensibility] principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.'" 517 U.S. at 575-76 (quoting *Solem* v. *Helm*, 463 U.S. 277, 292-93 (1983)).

The Court's guidance on the application of the reprehensibility factor thus tracks a basic intuition built into an legal culture—that certain acts are, by their very nature, more blameworthy than others. And one of the primary

indicators of such blameworthiness is whether an act is violent or carries an inherent risk of physical injury.[3]

Accordingly, in its statement in *Gore*, this Court focused on the nature of the activity—not the nature of the harm. This focus makes good sense. In determining the reprehensibility of the defendants' actions, courts should focus on what the defendant did—*i.e.*, did the wrongdoing occur in the context of an economic transaction or was it an act aimed at causing physical harm to the plaintiff.

In accord with this basic intuition, this Court has already decided that State Farm's behavior is categorically different than a case involving "physical assault or trauma." *State Farm*, 538 U.S. at 426. Certiorari is thus appropriate to overturn the Utah Supreme Court's disregard for this Court's precedents, including the Court's earlier decision in this very case.

B. As A Matter Of Sound Economic Policy, It Makes No Sense To Punish Business Conduct That May Impose Economic Or Even Emotional Harm As Severely As Physical Assault.

The Utah Supreme Court's decision to punish business conduct that may impose economic and emotional harm as severely as physical assaults should also be rejected because it creates vast uncertainty, thereby undermining the deterrence value of punitive damages.

One of the primary goals of punitive damages is to deter individuals from engaging in reprehensible behavior. See, *e.g.*, *State Farm*, 538 U.S. at 416 ("[P]unitive damages serve a broader function; they are aimed at deterrence and

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[3] Other relevant considerations include whether the defendant targeted a particularly vulnerable individual or demonstrated a reckless disregard for the health and safety of others. *State Farm*, 538 U.S. at 419. As with the distinction between a violent and non-violent act, these factors focus on the behavior of the defendant.

retribution."). From an economic standpoint, punitive damages are useful because the threat of a potential punitive award creates an economic incentive not to engage in reprehensible conduct. But punitive damages can be effective at deterring such conduct only to the extent that individuals can foresee liability. If a defendant cannot foresee punitive liability accruing as a result of given conduct, the threat of punitive damages will not have any deterrent effect.

Accordingly, rules for imposing punitive damages should be ordered to create the greatest degree of foreseeability possible. Bright-line rules that clearly delineate what behavior will be punished should thus be favored over ad hoc rules, which necessarily create uncertainty.[4]

The Utah Supreme Court's ruling ignores the necessity of bright-line rules governing punitive liability. By contrast, this Court's decisions provided a clear dividing line between damages caused by transgressions in the economic realm and physical injuries suffered as a result of physical assaults. *Gore*, 517 U.S. at 575-76; *State Farm*, 538 U.S. at 426. While this Court's decisions do not rule out punitive liability

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[4] In the context of punitive damages, bright-line rules are also appropriate for non-economic reasons: potential defendants are entitled, as a matter of due process, to know that their actions can lead to punitive damage liability and at what level of severity. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) ("Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."). Favoring bright-line rules in the punitive context also is in accord with this Court's more general statements that, in the context of criminal statutes, potential defendants must be put on notice that their actions will create liability. *See, e.g.*, *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (explaining that the rule of lenity is designed to ensure that "'fair warning [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'").

for actions that merely cause economic harms, they clearly indicate that such liability should be relatively modest.

The Utah Supreme Court's decision effectively uprooted this principle, substituting in its place what amounts to a regime of "we know reprehensible economic conduct when we see it." That is, under Utah Supreme Court's decision, economic transgressions that courts deem particularly egregious will be held to warrant much higher punitive awards. But this category of behavior is not well-defined and a potential defendant cannot, with any confidence, predict whether its behavior will be deemed to fall within this category.

The decision, if not reversed, thus makes it nearly impossible for companies and individuals to predict, *ex ante*, what activities are sufficiently "reprehensible" to create disproportionately high punitive liability. The uncertainty created by the Utah Court's decision will lead, in turn, to negative economic effects. As one prominent commentator has put it:

> If awards are unpredictable . . . resources are likely to be wasted on [the calculation of the risk of a punitive award], and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

C. R. Sunstein et al., *Assessing Punitive Damages (With Notes On Cognition And Valuation In Law)*, 107 Yale L.J. 2071, 2077 (1998) (footnote omitted).

This Court should grant certiorari so that it can reestablish the bright-line rule laid down in *State Farm*, *i.e.*, that transgressions in the economic realm do not warrant punitive liability as severe as those for violent actions such as physical assaults.

III. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A GOOD-FAITH VIGOROUS DEFENSE IN COURT CANNOT BE CONSIDERED EVIDENCE OF "REPREHENSIBILITY" IN THE REVIEW OF PUNITIVE DAMAGE AWARDS.

A final reason to grant review in this case is to resolve the issue of whether a vigorous defense can be considered a factor in the reprehensibility analysis. In *State Farm*, this Court reiterated that "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). With regard to that factor, a "State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at 421. Thus, a State may not "punish and deter conduct that b[ears] no relation to the [plaintiff's] harm" or that is "independent from the acts upon which liability was premised." *Id.* at 422.

On remand, the Utah Supreme Court nevertheless proceeded to justify a $9 million punitive award based upon its disagreement with State Farm's litigation strategy in defending against plaintiff's lawsuit. Pet. App. 12a-14a. Thus, the court criticized State Farm's "'refus[al] in its brief on appeal to concede any error or impropriety in the handling of [plaintiff's] case'" and State Farm's "defiance" in failing to demonstrate to the lower court's satisfaction "that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of pride and victimization." *Id.* at 13a. That ruling merits this court's review because it is contrary to this Court's decisions and would improperly chill legitimate advocacy.

A. The Decision Below Conflicts With Controlling Decisions Of This Court.

1. This Court consistently has held that the Due Process Clause of the Fourteenth Amendment prevents imposition of

a punishment against a party based upon the exercise of a constitutional right. For example, in *Griffin* v. *California*, 380 U.S. 609 (1965), this Court ruled that a defendant's exercise of his right to remain silent, as guaranteed by the Fifth and Fourteenth Amendments, could not be penalized by a court through an instruction informing the jury that "such silence is evidence of guilt." *Id.* at 615. Such an instruction was unconstitutional because it was "a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 614.

Similarly, in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court considered the limitations imposed by the Due Process Clause on the punishment of a defendant who successfully challenged a court's prior judgment. *Id.* at 724. The Court explained that it "would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence" where a defendant successfully challenges the original punishment meted out by the court. *Id.* at 723-24. The Court reasoned that "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due process of law," *id.* at 724, because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" thereafter, *id.* at 725.

Thereafter, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), this Court underscored the continuing vitality of cases such as *Pearce* by contrasting a plea bargain—which generally involve give-and-take negotiation—from "State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction." *Id.* at 362. The former conduct was permissible but the latter violated due process because, "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Id.* at 363 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 & n.20 (1973)). The critical

factor for the Court was the bedrock principle that "[t]o punish a person because he has done what the law allows him to do is a due process violation of the most basic sort." *Id.*

In *Gore*, this Court applied these same due process limitations to analyze the proper scope of punitive damages awards. 517 U.S. at 572-73 & n.19. Relying upon *Bordenkircher*, the *Gore* Court held that a state could not impose a punishment to deter out-of-states conduct that "is lawful in other jurisdictions." *Id.* at 573. That limitation on a State's power to punish and deter out-of-state conduct that was legal where it occurred followed directly from the well-developed rule that a sentencing court could not "properly *punish* lawful conduct." *Id.* at 573 n.19; *accord State Farm*, 538 U.S. at 421.

2. The decision below creates a direct conflict with these decisions. That is because it unapologetically seeks to justify a punitive award in excess of $9 million on State Farm's exercise of its right to defend itself against plaintiff's claims at trial and the conduct of its appeal of the jury's verdict. Pet. App. at 12a-14a. The court below, pointing to State Farm's original appeal brief, held that (1) State Farm's "obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence" and (2) "State Farm has directed us to no evidence suggesting that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of pride and victimization." *Id.* at 13a. Thus, the court below viewed State Farm's exercise of its statutory appellate rights—and perhaps even its resort to this Court—as "defiance" and "callousness" that justified an increased punitive award. *Id.*

This Court's cases, however, make plain that a party cannot be punished for engaging in conduct that is lawful. *Gore*, 517 U.S. at 572-73; *Bordenkircher*, 434 U.S. at 362; *Pearce*, 395 U.S. at 724; *Griffin*, 380 U.S. at 615. It follows that a defendant's exercise of its constitutional right to defend itself

in litigation cannot be used to justify imposition of a more severe punishment.

B. As A Matter Of Sound Economic Policy, It Makes No Sense To Punish Or Deter A Vigorous But Good-Faith Defense.

The decision below also creates harmful economic policy consequences by deterring and punishing legally protected conduct and undermining the efficient operation of the adversary system.

This Court has noted that punitive damages may be imposed "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568; see also *State Farm*, 538 U.S. at 416. At the same time, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 422-23. Indeed, even when such dissimilar conduct might be illegal, punitive damages may not be awarded because to do so "creates the possibility of multiple punitive damages awards for the same conduct." *Id.* at 423.

The decision below, however, reflects a hostility to zealous advocacy that, if left uncorrected, would create powerful and dangerous economic incentives.

First, the court engaged in the very sort of over-deterrence condemned by this Court in *State Farm* by punishing defendant's "dissimilar acts." 538 U.S. at 422. Under *State Farm*, dissimilar conduct—even if unlawful—cannot be the basis of a punitive award. *Id.* at 423 (highlighting danger of "double counting"). Indeed, if dissimilar conduct is punished, the deterrence value of punishing the conduct at issue in the litigation—the conduct found unlawful—will be seriously diluted.

Here, there can be no question that State Farm's litigation strategy in defending against the Campbell's claims had

nothing to do with the underlying conduct at issue in the Campbell's lawsuit. Accordingly, punishing that conduct serves no useful deterrence function and, indeed, dilutes and undermines the deterrence value of punishing the conduct that was in fact at issue in the litigation.

Second, the "conduct" relied upon by the court below to justify an increased penalty manifestly was not unlawful conduct. To the contrary, State Farm was punished for contesting the jury's verdict on appeal and successfully seeking review of the Utah Supreme Court's decision.

As this Court has explained in the context of criminal trials, the very notion of an adversarial system of justice is that "'truth . . . is best discovered by powerful statements on both sides of the question.'" *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)). Indeed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). This adversarial system is dependent upon zealous counsel promoting the interests of their clients within properly circumscribed ethical and legal limits. *Cronic*, 466 U.S. at 656 n.19. To punish zealous advocacy solely because it is zealous (rather than, say, contumacious) is to undermine that entire system.

Under the decision below, then, defendants in a lawsuit may be deterred from defending themselves zealously for fear that their advocacy will be interpreted as "defiance" that will be used to justify an additional layer of punishment that dwarfs the actual harm allegedly caused by their conduct. Such punishment will not only dilute the law's effort to deter the conduct found unlawful, but will also deter other

conduct—vigorous advocacy—that is highly valued by our society and, indeed, by our Constitution.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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